Three Strikes Against The So-Called Real ID Act (HR 418): Bad for National Security Bad for Civil Liberties Bad for Victims of Persecution

Legislative Report of the
House Judiciary Committee Democratic Staff

February 9, 2005

Analysis of H.R. 418, The Real ID Act
February 9, 2005
Prepared by House Judiciary Democratic Staff

This week, the House is expected to take up H.R. 418, the so-called "REAL ID Act." H.R. 418 includes a number of extreme, anti-immigrant provisions that were stricken from the Intelligence Reform and Terrorism Prevention Act of 2004 (P.L. 108-458) before it was passed into law at the end of the 108th Congress. These controversial provisions were not supported by the 9/11 Commission, or by most of the 9/11 families.

In particular, H.R. 418 includes provisions limiting asylum rights of refugees, imposing onerous new driver's license requirements on the 50 states that overturn those standards just imposed under the recently enacted 9/11 bill, providing broad new grounds of inadmissability and expanded grounds of removal for immigrants and that violate freedom of speech of speech and association, a provision waiving all federal laws to mandate the construction of fences and barriers anywhere within the United States, and stripping courts of jurisdiction and denying immigrants long standing habeas corpus rights. If enacted into law, this legislation would constitute the most dangerous and anti-immigrant set of changes to our asylum laws in several generations. This will close America's doors to many Cubans fleeing Castro; Jews, Christians and other religious or ethnic minorities seeking safe haven; and women fleeing sex trafficking, rape, and domestic violence.

We have been down this road of overreaction and unnecessary hostility toward immigrant in the past. During the Civil War, President Lincoln suspended Habeas Corpus, and General Grant sought to expel the Jews from the South. The aftermath of World War I brought about the notorious Palmer raids against immigrant groups. World War II led to the unconscionable internment of Japanese Americans. After the Oklahoma City bombings, we passed laws narrowing asylum and gutting habeas corpus. In the wake of the 9/11 tragedy, and even after we have passed the Patriot Act, some would further target immigrants for crimes they have not committed, and sins they are not responsible. At some point, we have to treat terrorism as a problem that requires a coordinated and intelligent response, and better and more informed intelligence, as opposed to an excuse to scapegoat immigrants and erect a "fortress America" that fears foreigners as H.R. 418 does.

It is for these reasons that numerous groups strongly oppose this bill, including a wide variety of immigrant rights groups (National Council of La Raza, Hebrew Immigrant Aid Society, Irish American Unity, Mexican American Legal Defense and Education Fund, Asian American Legal Defense and Education Fund, Arab American Anti-Discrimination Committee); civil rights groups (ACLU, Leadership Conference on Civil Rights, People for the American Way); conservative groups concerned about privacy rights (Gun Owners of America, American Conservative Union); immigration law groups (American Immigration Lawyers Association, National Immigration Law Center, National Immigration Forum); labor groups (AFL-CIO, SEIU, UNITE); environmental groups (Natural Resources Defense Council, Audubon Society); Native-American groups (National Congress of American Indians); religious groups (American Jewish Committee, U.S. Conference of Catholic Bishops, Anti-Defamation League, Episcopal Migration Ministries); groups concerned about states' rights (National Governors Association,

National Conference of State Legislators, American Voter Vehicles Administration); and international human rights groups (United Nations High Commission for Refugees, Amnesty International USA, Human Rights First).[1] The legislation is also opposed by the 9/11 Families for a Peaceful Tomorrow.

Moreover, we note that the Judiciary Committee and other Committees of jurisdiction

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[1] Letters of following groups in opposition to H.R. 418 on file with the House Judiciary Committee Democratic Staff: American Civil Liberties Union (ACLU); American-Arab Anti-Discrimination Committee (ADC); American Federation of Labor- Congress of Industrial Organizations (AFL-CIO); American Friends Service Committee; American Immigration Lawyers Association (AILA); American Jewish Committee; Amnesty International USA; Anti-Defamation League; Arab-American Anti-Discrimination Committee; Asian American Legal Defense and Education Fund; Asian and Pacific Islander American Health Forum; Asian Law Caucus; Asian Pacific American Labor Alliance, AFL-CIO; Asian Pacific American Legal Center of Southern California; Bill of Rights Defense Committee; Catholic Charities USA; Center for Gender and Refugee Studies, Univ. of Calif., Hastings College of the Law; Center for Community Change; Center for National Security Studies; Episcopal Migration Ministries; Fair Immigration Reform Movement; Golden Vision Foundation; Harvard Immigration and Refugee Clinical Program, Harvard Law School; Heartland Alliance for Human Needs & Human Rights; Hebrew Immigrant Aid Society; Hmong National Development; Human Rights First; Illinois Coalition for Immigrant and Refugee Rights; Immigration Unit of Greater Boston Legal Services; Irish American Unity Conference; Jewish Community Action; Jewish Council for Public Affairs; Korean Alliance for Peace and Justice (KAPJ); Korean American Coalition; Kurdish Human Rights Watch, Inc.; Labor Council for Latin American Advancement; Latin American Legal Defense and Education Fund; Leadership Conference on Civil Rights; League of United Latin American Citizens; Mexican American Legal Defense and Educational Fund; Midwest Immigrant & Human Rights Center; The Multiracial Activist; National Asian Pacific American Bar Association; National Asian Pacific American Legal Consortium (NAPALC); National Asian Pacific American Women's Forum; National Association of Latino Elected and Appointed Officials Education Fund; National Coalition for Asian Pacific American Community Development; National Conference of State Legislatures (NCSL); National Council of La Raza; National Day Laborer Organizing Network; National Employment Law Project; National Federation of Filipino American Associations; National Immigrant Solidarity Network; National Immigration Forum; National Immigration Law Center; National Korean American Service & Education Consortium; Organization of Chinese Americans; Peace Action; People for the American Way; Refugee Law Center; Rural Opportunities; Service Employees International Union; Sikh American Legal Defense and Education Fund; Sikh Coalition; South Asian American Leaders of Tomorrow; South Asian Network; Southeast Asia Resource Action Center; Tahirih Justice Center; United Nations High Commission for Refugees; Unitarian Universalist Association of Congregations; Unitarian Universalist Service Committee; UNITE HERE; U.S. Committee for Refugees and Immigrants (USCRI); Washington Lawyers' Committee for Civil Rights and Urban Affairs; Women's Commission for Refugee Women and Children; World Organization for Human Rights USA; World Relief; YKASEC-Empowering the Korean American Community; Young Koreans United of USA.

have been denied the opportunity to hear expert testimony on the impact of these sweeping changes to current law and to offer amendments to the proposed legislation. In fact, on January 13, 2005, Democratic Members of the Subcommittee on Immigration, Border Security and Claims sent a letter to Subcommittee Chairman Hostettler requesting that a hearing and markup of H.R. 418 be scheduled in the Subcommittee.[2] Denial of this request followed by the expedited consideration of H.R. 418 has effectively squelched meaningful debate on the complex policy issues, undermined the channels of jurisdiction and oversight, and set a dangerous precedent for circumventing the legislative process.[3] Even more problematic, is the fact that this legislation is being overhauled at the last minute – again without the benefit of hearings or markup – as a result of a just released 18-page manager's amendment revising the entire complex bill submitted by Chairman Sensenbrenner.

The following is a description of the legislation, an itemization of the public policy concerns with the bill, and a rebuttal of various myths and other disinformation concerning the bill.

I. Description of Legislation

Section 101 of the bill, as revised by the Manager's amendment would severely limit the asylum rights of all refugees, not just those involved in terrorism. Among other things, the bill would (1) require refugees to prove that a "central reason" for their persecution was one of the enumerated grounds (race, religion, national origin, political opinion, or social group); (2) require refugees to obtain corroborating evidence in most cases and bar judicial reversal with regard to these matters; (3) authorizes credibility determinations to be based on demeanor or the consistency of an applicant's written or oral statements, even those made when not under oath; (4) strips courts from being able to review discretionary judgments; and (5) repeals the provision enacted intelligence reform legislation mandating a GAO study of our asylum system.

Under the Manager's amendment, these provisions are made even more onerous. Although the amendment eliminates the annual cap on asylum adjustment added by the Republicans in 1996, on the whole it further damages asylum and other rights. For example, the amendment specifies that the trier of fact may base a credibility determination on *any* factor – apparently in an attempt to defeat arguments that credibility assessments would need to be based on the totality of relevant factors. In addition, the amendment would allow a person to be denied asylum based on any inconsistencies or inaccuracies or falsehoods in their testimony, between their oral testimony and their written application, between their testimony and that of a witness, between their application and country conditions documentation, etc., without regard to whether such inconsistency or inaccuracy goes to the heart of the person's claim. In other words, a person could be denied asylum based on an inconsistency that is in fact immaterial. In addition to applying this series of new evidentiary restrictions beyond asylum cases to cases involving withholding of removal, the amendment extends the restrictions to any case involving requests

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[2] Letter to Congressman John Hostettler from Rep. Sheila Jackson Lee, et al, January 13, 2005.

[3] Include House Rules on committee consideration??

for relief, such as those under the Convention Against Torture, Cuban Adjustment Act and the Violence Against Women Act.

Section 102 of the bill would require the Secretary of Homeland Security to waive any law whatsoever, including environmental laws, labor laws, and laws relevant to tribal lands, that is necessary for the expeditious construction of barriers to prevent unlawful immigration at any U.S. border or in the interior. Additionally, it would prohibit all judicial review of a waiver decision or action by the Secretary and bar judicially ordered compensation, injunction or other remedy for damages alleged to result from any such decision or action.

Section 103 of the bill retroactively expands the grounds of inadmissibility, making an immigrant inadmissible, deportable and ineligible for refugee protection even if hr or she did not engage in *any* terrorist activity. These grounds of inadmissibility include replacing the current definitions of "terrorist organization" and "engage in terrorist activity" with language that would capture people unknowingly and indirectly linked to remote terrorist activities and expanding the grounds of inadmissibility based on endorsement of or support for these newly defined "terrorist organizations" or terror-related activity, among other things.

Section 104 of the bill would significantly expand the grounds for deportability, so that any immigrant who would be considered inadmissable under the new provisions of section 103 (relating to terrorist activity or association with a terrorist organization) would also be deportable. Under this provision the government could deport a long term resident for providing non-violent, humanitarian support to organizations subsequently labeled terrorist, even where such support was completely legal at the time it was provided.

Section 105 of the bill (also added by the Manager's amendment) would eliminate virtually all federal court review and habeas corpus review of orders of deportation, including claims arising under the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman, or Degrading Treatment or Punishment.

Title II of the bill repeals the bipartisan ID provisions included in the recently enacted Intelligence bill, and replaces it with new and far more stringent mandates on the states. Among other things, it requires all states within three years to overhaul their procedures for issuing driver's licenses and identification cards to meet federally-proscribed standards that require, among other things: (1) evidence that the applicant is lawfully present in the United States; and (2) issuance of temporary driver's licenses or identification cards to persons temporarily present that are valid only for their period of authorized stay (or for one year where the period of stay is indefinite).

This title also creates the functional equivalent of a single federal ID registry by requiring states to share with each other all of the personal information and driving histories on license and ID card holders. The new mandate applies regardless of whether or not additional grants are made to the states. Section 204 of the bill also includes a less controversial provision expanding the definition of trafficking in false documents to make it illegal to traffic actual authentication features, in addition to false authentication features.

II. Concerns with Legislation

A. Asylum Provisions Would Harm Legitimate Refugees

The asylum provisions in H.R. 418, impose significant changes to asylum law, withholding of removal and other requests for immigration relief that create insurmountable hurdles for refugees and other immigrants seeking safe haven in the United States. The United Nations High Commissioner for Refugees (UNHCR) states in its recent letter, "we believe the provisions in H.R. 418 that impact refugee protection do not achieve this goal [of preventing terrorists from abusing asylum systems] and could prevent those truly at risk of persecution from finding safety in the U.S." The White House opposed a near identical provision when it was included in the 9/11 legislation, and Rep. Chris Smith offered an amendment to delete this provision on the House floor (which passed, before being defeated in a revote). It is particularly unconscionable to make these changes when the bipartisan U.S. Commission on International Religious Freedom characterized our asylum system as unfair and subject to extraordinary disparities between regions. These provisions should be opposed for several reasons.

1. Terrorists Are Ineligible for Asylum Under Current Law

First, it is important to note that although the stated rationale for the legislation is to prevent terrorists from obtaining asylum, current law already prevents terrorists from exploiting our laws to obtain asylum. Terrorists are already ineligible for asylum under § 208(b)(2)(A)(iv) and (v) of the INA. This section explicitly provides that anyone the Attorney General believes has engaged in terrorism or may engage in terrorism is ineligible for asylum protection. Moreover, section 236A of the INA – added by the USA PATRIOT Act – provides that the Attorney General shall take into custody an alien if the Attorney General has reasonable grounds to believe the alien is a terrorist.[4]

In fact, asylum-seekers already undergo stringent security checks before their asylum is granted. INA §208(d)(5)(A)(i) provides that asylum-seekers have:

- Names and birth dates checked against DHS, FBI, CIA, and State Department databases.
- Fingerprints sent to the FBI for a criminal background check, which includes comparing the applicants' fingerprints with all arrest records in the FBI's database.

[4]Cory Smith, Legislative Counsel for Human Rights First, states, "This bill does nothing to ensure America's security. . . Instead, it targets the most vulnerable – those fleeing repressive regimes – while doing nothing to make our nation safer. The irony is that many of these refugees are America's friends, fighting abroad for democratic reform, risking their lives to further religious liberty and combating political extremism. When they and their families face torture or death, when their claims are credible, when they have cleared exhaustive security checks, America should be opening her doors, not closing them."

- A special immigration database, IDENT, compares each applicant's fingerprints against those of all others who have applied since 1998, to prevent people from thwarting the system by applying more than once under different names.

2. Bill Makes It Harder for Bona Fide Refugees to Prove Their Valid Claims

Second, this provision will add a new requirement demanding that asylees prove the central reason for their persecution in order to qualify for asylum protection. It will force judges to deny asylum to genuine refugees if they cannot prove their persecutor's "central reason" for harming them -- an impossible task in cases where various reasons may have motivated the persecution. Valid refugee claims will be denied if they have any slight inconsistencies between statements made at any time, (whether written or oral, and whether or not under oath) and testimony before an immigration judge. Such inconsistencies are frequent when statements are made without translation upon arrival, and before more thorough, properly translated statements can be made in court.

Several examples illustrate the problems of denying asylum across the board in these mixed motive cases, as H.R. 418 would do.

- Many asylum-seekers – such as refugees from the Darfur region – cannot go back to the regimes they fled and ask for "proof" of their persecution. Family members back home may be too frightened to corroborate the evidence, for fear of reprisals.

- A sex trafficking victim may be afraid to tell the male, uniformed border inspector about her brutal rape at the hands of her assailants. In an asylum hearing, she discusses it. Because her story is "inconsistent," she will be denied asylum.

- A Russian gang attacks a prominent Jewish leader in Moscow, beating him unconscious, stealing her car, and calling him a "dirty Jew." This is a "mixed motive" attach – robbery *and* anti-Semitism. His asylum claim based on his fear of persecution would be impossible to prove, and therefore denied, under section 101 of this bill.

It is important to note the Board of Immigration Appeals (BIA) has ruled that asylum applicants are not required to show conclusively why persecution has or will occur because such showings are virtually impossible.[5] This bill would reverse this BIA decision and place an enormous and unnecessary burden on asylum seekers by requiring them to prove with unrealistic

[5] In the Matter of S-P-, 21 I&N Dec. 486 (BIA 1996). The case involved a Sri Lankan who was tortured by his government purportedly to ascertain information about the identities of guerrillas and the location of camps, but also because of an unstated assumption by his torturers that his political views were antithetical to the government.

precision what is going on in their persecutor's mind.[6]

Furthermore, the Refugee Convention definition of a refugee, and its definitive interpretation in the United Nations High Commissioner For Refugees Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, do not require proof of the motives behind persecution. In fact, these documents acknowledge that a person seeking refuge "may not be aware of the reasons for the persecution feared." To meet the test that persecution be "on account of" one of the prohibited grounds, it is sufficient to show persecution is motivated in part by one of those grounds. Asking a refugee or asylum applicant to parse his persecutor's motivations so finely as to distill the central motive is asking asylum seekers to read the minds of their persecutors. Moreover, current Supreme Court case law interpreting the "on account of" requirement is already the strictest in the world.

3. Bill Poses Impossible Hurdle of Requiring Corroborating Evidence from Refugees Fleeing Persecution and Limits Judicial Review

The legislation would also permit adjudicators to deny asylum because the applicant is unable to provide corroborating evidence of "certain alleged facts pertaining to the specifics of their claim." This disproportionately harms applicants who are detained and/or lack counsel. In addition, the bill would bar judicial review of a denial of asylum based on an applicant's failure to provide corroborating evidence. When people flee for their lives, they often leave everything and everyone behind. Requiring refugees to provide witnesses and documents in a U.S. court to prove events that occurred in a far away country creates another unsurmountable hurdle for many bona fide refugees.[7]

4. The Bill Makes Subjective Factors Like Demeanor Grounds for Denial of Asylum

The legislation also introduces new credibility grounds for denying asylum. It would make the applicant's "demeanor" and other highly subjective factors into factors that could determine their credibility and the assessment of their story. Demeanor is highly cultural and subjective. Assessments of demeanor should not be relied on as heavily as evidence, because

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[6]"Determining which of a persecutor's reasons or motives are "central" to his/her actions is often very difficult, if not impossible, to do. Under international standards, '[i]t is immaterial whether the persecution arises from any single one of [the enumerated] reasons or from a combination of two or more of them. Often the applicant himself may not be aware of the reason for the persecution feared. It is not, however, his duty to analyse[sic] his case to such an extent as to identify the reason in detail.' This is particularly true for children seeking asylum." UNHCR, letter dated Feb. 4, 2005.

[7]According to the UNHCR, "many refugees arrive with barest necessities and very frequently without personal documents. It may be very difficult, if not impossible, for them to obtain corroborating evidence of their personal situations without putting themselves, their families or others at risk. . . As a result, asylum applicants should be given the benefit of the doubt to the extent possible." Letter, Feb. 4, 2005.

they are frequently incorrect assessments based on the cultural differences between the refugee and the American adjudicator.[8] Moreover, torture victims often have what mental health professionals call a "blank affect" when recounting their experiences, a demeanor that an adjudicator might misinterpret as demonstrating lack of credibility.

Additionally, it may be difficult or impossible for asylum applicants to recount their experiences, depending on the nature of their psychological trauma. For example, survivors of torture, such as rape, or forced abortion or sterilization may not be comfortable telling this information to a uniformed male inspection officer in an airport. Also, applicants may not be provided with appropriate interpreters in airport inspection areas. They may understandably fear discussing problems in their home countries in any detail until later in the process when it is made clear to them that they are not going to be sent back to their home countries without their claims being heard. Several courts of appeals even have emphasized that statements taken under such conditions are unreliable.

Even more problematic, the Manager's amendment specifies that the trier of fact may base a credibility determination on any factor**.** This is apparently in an attempt to defeat arguments that credibility assessments would need to be based on the totality of relevant factors. Under this amendment, relevant factors would include essentially the same list given in the original bill, some of which (e.g. demeanor, inconsistency with prior statements given to an immigration inspector upon arrival at the airport and while in fear of imminent return to the country of persecution) are notoriously unreliable indicators of credibility.

Another concern is that the Manager's amendment would allow a person to be denied asylum based on any inconsistencies or inaccuracies or falsehoods in their testimony, between their oral testimony and their written application, between their testimony and that of a witness, between their application and country conditions documentation, etc., without regard to whether such inconsistency or inaccuracy goes to the heart of the person's claim. In other words, a person could be denied asylum based on an inconsistency that is in fact immaterial. This goes against existing law, internal DHS policy and guidelines, UNHCR guidelines, and the normal logic of credibility assessments, which currently focuses on whether an inconsistency actually makes a difference to a person's eligibility for asylum. So an asylum applicant who testifies credibly and consistently about the facts that are relevant to her claim of persecution could apparently be denied asylum because she does not remember the date of her high school graduation, even if that has *nothing to do* with her fear of persecution. Many credible asylum applicants misremember immaterial details like the dates of their weddings or of children's births (often because the precise dates of such events are not significant in their culture, and/or because they

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[8] In one culture, looking a judge in the eye would be interpreted as candor, while in another it would be interpreted as contempt; downcast eyes might be interpreted as respect for authority in one culture and evasiveness in another. *See also*, "Inability to remember or provide all dates or minor details, as well as minor inconsistencies, insubstantial vagueness or incorrect statements which are not material may be taken into account in the final assessment on credibility, but should not be used as decisive factors." UNHCR, *Note on Burden and Standard of Proof in Refugee Claims*, ¶ III(9). 16 Dec. 1998.

are operating on a different calendar).

5. Bill Repeals Intelligence Reform Act on Asylum

It is important to note that Congress just ordered the GAO to conduct a study regarding the issue of asylum and terrorists as part of the 9/11 Act. The study will evaluate "the extent to which weaknesses in the United States asylum system and withholding of removal system have been or could be exploited by aliens connected to, charged in connection with, or tied to terrorist activity."[9] The GAO has already begun its investigation.

At Chairman Sensenbrenner's urging, Congress ordered the GAO to investigate the number of aliens with terrorist connections who (1) applied for, were granted and denied asylum, (2) applied for, were granted or denied release from detention, (3) were denied asylum but remain free in the U.S.. They study will also look at legal processes for adjudicating refugees – examining the impact of confidentiality provisions, the impact of legal precedent on the Government's ability to deport, refute imputed political opinion, challenge credibility, reverse decisions, and use classified information for removal. In addition, GAO will assess the likelihood that an alien with ties to terrorism has received asylum or withholding of removal or has used the asylum system to enter or remain in the U.S. to plan, conspire or carry out an act of terrorism.

Although the study is heavily weighted with biased language presuming that terrorist are making widespread use of asylum to enter and remain in the U.S., we should allow GAO to complete its assessment of whether our asylum system is vulnerable to facilitating terrorists in the U.S. before we overhaul our asylum laws. Instead, this bill would repeal the study.

6. Bill Would Deny Asylum for Inconsistent Statements from the Applicant

H.R. 418 also allows asylum to be denied for inconsistencies between any statement the applicant made, at any time, to any U.S. official, and their testimony in court. In order to escape persecution and flee to safety, refugees sometimes misrepresent why they are leaving one country and entering another. For reasons of fear, desperation, confusion and trauma they often do not tell the full story or, necessarily, the accurate story. Using an applicant's first statement to any U.S. official to impeach his or her sworn testimony, no matter how well supported, is unreasonable, infair, and unprecedented.

7. Bill Would Limit other Forms of Relief, Including those under the Convention Against Torture, the Cuban Adjustment Act and the Violence Against Women Act

The Manager's amendment adds an entirely new subsection (c), titled "Other Requests for Relief from Removal," which would introduce similar requirements for corroborating

[9] P.L. ___ , Section 5403.

evidence to those outlined above in connection with all other forms of relief from removal. This would not only apply to applications for withholding or deferral of removal under the Convention Against Torture, but also to any kind of relief that could be adjudicated by an immigration judge, such as the Cuban Adjustment Act, cancellation of removal, Violence Against Women Act cancellation, NACARA, 212(c) relief, adjustment of status, voluntary departure. This amazingly broad restriction on immigrants' legal rights would have a negative, and totally unnecessary impact on refugees fleeing torture, Cubans fleeing Castro's repressive regime, and women fleeing sexual persecution and harm. None of these groups have any obvious nexus toward the terrorists the bill purports to target.

8. The Effect of These Provisions on A Real Case

The effect of these provisions are best illustrated through an actual asylum petition that would have turned out quite differently had H.R. 418 been the law in effect at the time.

The findings of fact by the appellate court recount that Olimpia Lazo-Majano, a young Salvadoran mother of three, was 29, in 1981, when her husband fled El Salvador for political reasons. Ms. Lazo-Majano remained in El Salvador, working as a domestic. In mid-1982, Ms. Lazo-Majano was hired by a sergeant in the Salvadoran armed forces named Rene Zuniga. After Ms. Lazo-Majano had been working for him for several weeks, Zuniga raped her at gun point. This began a period of abuse during which Zuniga beat Ms. Lazo-Majano, threatened her, tore up her identity card and forced her to eat it, dragged her by the hair in public, held hand grenades against her head, and threatened to bomb her.

Ms. Lazo-Majano felt trapped and powerless to resist Zuniga, because he accused her of being a subversive and threatened that if she reported him or tried to resist him, he would denounce her or kill her as a subversive. Ms. Lazo-Majano believed him: she knew a teenage boy who was believed to have been tortured and killed by the army; the husband of a neighbor had been taken away at night together with a group of other men and killed the preceding year; and numerous young girls who had been raped with impunity.

In late 1982, Ms. Lazo-Majano escaped and fled to the United States, entering the country without inspection. Neither the Immigration Judge who heard her request for asylum nor the Board of Immigration Appeals doubted her credibility. But the Immigration Judge ordered her deported to El Salvador, and the BIA upheld that decision in 1985, on the grounds that "such strictly personal actions do not constitute persecution within the meaning of the Act." Ms. Lazo-Majano appealed to the federal court of appeals. The court of appeals reversed the BIA, holding that Zuniga "had his gun, his grenades, his bombs, his authority and his hold over Olimpia because he was a member" of an army unrestrained by civilian control. The court found that his cynical imputation to her of subversive political opinions, and the danger that he would kill her or have her killed on this basis, qualified her for asylum.

If H.R. 418 had been law, this case almost certainly would not have been decided in Ms. Lazo-Majano's favor. This bill would have required her to establish not only that she was the wife of someone who fled the country for political reasons, that her persecutor attributed "subversive" political opinions to her, and that his desire to stamp out any resistance to his

dominance over her as a man and an officer in the ruling army motivated his persecution of her, but also that her political opinion was a "central reason" for the persecution. A dissenting judge on the court of appeals in this case took the view that Ms. Lazo-Majano was "abused . . . purely for sexual, and clearly ego reasons" and was therefore not eligible for asylum Under the proposed change in asylum law, the dissenting view could have prevailed and denied Ms. Lazo-Majano asylum.

The legislation is inconsistent with our nation's longstanding commitments against persecution and torture. Undoubtedly, implementation of the standards proposed in this bill will undoubtedly result in denying asylum to bona fide refugees fleeing persecution. "The REAL ID Act has direct life and death consequences for genuine refugees," according to Cory Smith at Human Rights First. "The bill places many refugees, including those fleeing religious persecution, at risk of being returned to their torturers or to death," he wrote.[10] Most of these asylum-seekers will then be returned to the hands of the governments and communities that persecuted them. As a result, many bona fide refugees will face persecution, torture or death.

B. Fence Waiver Provision Would Apply Anywhere in U.S. and Contravene Laws concerning the Environment, Labor, and Native Americans

The proponents of H.R. 418 contend that section 102 is necessary in order to expedite the construction of a three-mile section of a 14-mile fence near San Diego. In reality, however, section 102 of H.R. 418 is much more expansive and dangerous.

What is the fence? There is currently a border fence on the California-Mexico border in the San Diego area designed to prevent people from illegally crossing the border. This fence is supposed to extend for 14 miles. According to Congressional Research Service, only 9 miles of the triple fence have been completed.

The fence extends inland from the Pacific Ocean. It covers approximately 7,000 miles of territory. Two sections including the final three miles section leading to the Pacific Ocean have not been completed. In order to finish the fence the Border Patrol proposed filling in a canyon known as Smugglers Gulch. The fence would then be built across the canyon.

The California Coastal Commission halted completion of the fence in February 2004, because the Department of Homeland Security's practices were not consistent with the State of California's Coastal Management Program which is approved under federal law. The Coastal Zone Management Act (CZMA) provides that federal activity impacting any land or water use or natural resource of the coastal zone must be carried out in a manner consistent with the approved coastal management program. Additionally, the California Coastal Commission said that the DHS's Bureau of Customs and Border Patrol failed to prove that other less environmentally

[10] "A broad coalition of faith-based organizations, including the Episcopal Migration Ministries, Jesuit Refugee Service, Hebrew Immigrant Aid Society, and World Relief, have expressed serious concern that the REAL ID Act will severely harm refugees fleeing religious based persecution." Cory Smith, Legislative Counsel, Human Rights.

damaging alternatives would have met the requirements of the 1996 Immigration Act.

H.R. 418 is ill-advised for at least six basic reasons:

This Section's Waiver Authority is Dangerously Broad. It is without precedent.[11] The bill would require waiving *all* laws, including laws against murder; laws protecting civil rights; laws protecting the health and safety of workers; laws, such as the Davis-Bacon Act, which are intended to ensure that construction workers on federally-funded projects are paid the prevailing wage; environmental laws; and laws respecting sacred burial grounds.

The Waiver Authority Reaches Far Beyond the Fence. The broad waiver authority contained in the bill would apply to far more than the 14-mile fence near San Diego. In reality, the waiver would apply to all "physical barriers and roads (including the removal of obstacles to detection of illegal entrants) in the vicinity of the United States border to deter illegal crossings in areas of high illegal entry into the United States." The language in this bill waives all laws for not just the San Diego border fence but for any other barrier or fence that may come about in the future.

The Authority to Waive of "All Laws" is Mandatory; Not Discretionary. Section 102 would *require* the Secretary of Homeland Security to exercise the waiver authority; not merely authorize him to exercise the authority. Under H.R. 418, the Secretary would have no choice but to waive a law if he determined that waiving it was "necessary to ensure expeditious construction of the barriers and roads" in question.

The Section's Bars to Judicial Review are Unfair. Section 102 of H.R. 418 bars judicial review of a Secretary's decision to waive provisions of law by both federal *and* state courts. Not only is this grossly unfair, it goes against the Supreme Court's precedent that requires at least some forum be provided for the redress of constitutional rights. For example, in cases involving availability of effective remedies for Fifth Amendment takings, the Court has held that the compensation remedy is required by the Constitution.

This bill would bar all courts from ordering any compensatory, declaratory, injunctive, equitable or other forms of relief arising from border barrier construction activity. As proposed, HR 418 would even deprive relief to those whose property was taken as long as the Secretary decides it was necessary for the construction of the barrier. This language was removed from the intelligence bill in conference. H.R. 418's language again permits the Department of Homeland Security to violate every principle of fairness with impunity.

Construction of the Fence May Not be the Best Way to Detect and Deter Illegal Immigration. According to apprehension numbers by the Border Patrol, the primary fence did not result in large decreases in apprehensions. The completion of the fence may not be the wisest and most efficient use of taxpayers' dollars. There may well be other, more efficient alternatives

[11]After a review of federal law, CRS was unable to locate a waiver provision identical to that of section 102 of H.R. 418.

to completing the fence, including such options as speeding up implementation of section 5201 of the Intelligence Reform Bill, which requires the development and implementation of a comprehensive plan for the "systematic surveillance of the Southwest border of the United States by remotely piloted aircraft"; employing other electronic means of surveillance of the border; speeding up the hiring of additional border patrol agents; and assigning more border patrol agents at the Southwest border in the area where the fence has not yet been completed.

Pushing Migrants Eastward Will Result in More Border Deaths. The fence in California was part of the U.S. Border Patrol's strategy in their National Strategic Plan in the 1990s to reduce illegal immigration by placing agents and resources directly along the border. The idea behind Operation Hold the Line is that deploying border patrol agents directly or on close proximity to the border creates a visible deterrent to potential undocumented immigrants. This operation succeeded in deterring unlawful immigration in the areas where it was implemented but the problem continues to be that the flow of undocumented immigrants is redirected into other sectors. To the extent that the fence is successful, it will push more migrants to the Eastern desert area of Arizona and New Mexico, which will result in more migrants dying from exposure.

Lastly, according to the California Coastal Commission, project cost for the unfinished portion of the fence is $58 million. Other news reports approximate the cost in the neighborhood of $25 million. H.R. 418 is a non-funded mandate that dangerously provides the Secretary of Homeland Security with broad waiver authority and precludes judicial review of a Secretary's decision.

C. Expanding Grounds of Inadmissability would Burden Free Speech and Association

Current law contains an extensive list of grounds which can make an immigrant connected with terrorism inadmissible, and thus unable to receive a visa to enter the U.S. Basically, under current law, an immigrant cannot enter the country if he has provided any support, including humanitarian support, to a designated terrorist organization, or if he has provided any support for terrorist activity generally.

H.R. 418 dramatically expands these grounds of inadmissibility by making the following retroactive changes:

1. Broadening the class of organizations defined as "terrorist organizations" for purposes of inadmissibility;

2. Making people with affiliations to organizations with remote links to terrorism inadmissible; and

3. Expanding the use of the definition of "engage in terrorist activity" to apply even where the person did not know their solicitation of funds or people or other actions would further terrorist activity.

The bill will also make representatives of organizations that endorse or espouse terrorist

activity inadmissible – even if that endorsement is not public and is not found by the Secretary of State to undermine U.S. efforts to reduce terrorism, as required under current law. Because these broader standards will capture more organizations, more people will be inadmissible. Immigrants will be found inadmissible even if their organization's endorsement had no practical effect and posed no real threat to the United States or its interests. Under this new test, a person residing outside of Cuba who wrote an essay justifying armed struggle against Castro's dictatorial regime would be inadmissable to America.

The bill also makes people inadmissible if they are members of newly defined "terrorist organizations" unless they can show by the newly added high legal standard of "clear and convincing evidence", that they did not know, or had no means of knowing, that the organization was involved in terrorist activities. Current law only applies inadmissibility to members of terrorist organizations if the member "knows or should have known" that the group is a terrorist organization. This new standard will force people to prove by a strong measure of evidence that they did not know something, a virtually impossible standard to meet.

To illustrate, many people may become inadmissible by this standard if they have membership in an organization that, unbeknownst to them, meets the legal definition of a terrorist organization. This is particularly the case for people who are members of Muslim charity organizations. There are vast networks of global and international Muslim charities resulting from Islam's tenant requiring charitable donations from its able adherents. Thus, an immigrant in the U.S., who is a member of a global charity based overseas, could become inadmissible because that organization, unbeknownst to the immigrant, has given material support to a guerrilla rebel group that fits the terrorist organization definition. There is no realistic way they can prove they did not know facts of the organization's activities. Similarly, a Columbian rancher, who at the point of a gun, gave cattle to a guerilla group would be ineligible for entry to the U.S.

For example, an Indonesian or Sri Lankan living in the U.S. might give money to a local organization that is raising money for tsunami relief in their community. Unbeknownst to them, the money is sent to an umbrella group in one of those nations that also supports the Tamil Tiger rebels or the Achenese rebels. The U.S. immigrant would, by application of this provision, become inadmissible.

In addition, more people will be inadmissible because they solicit money for an organization or try to recruit people for membership in an organization that meets the definition of a terrorist organization (i.e. they are caught by expansion of the definition of "engage in terrorist activity"). Previously, such acts of solicitation would only make a person inadmissible if they knew that "the solicitation would further the organization's terrorist activity." H.R. 418 shifts the burden to the immigrant to prove - again by "clear and convincing evidence" - that they did not know the organization was a terrorist organization. So if an immigrant gives money to the charitable arm of an organization she knows also supports a rebellious faction (that qualifies as a terrorist organization under the INA), even if her money does in fact go for some charitable effort unrelated to support of the rebel activity, she would be inadmissible.

The bill would also deny entry to the U.S. based on the actions of spouses and parents.

Under the bill, a 13-year old child threatened with death because her father had joined an insurgency against her country's government could find herself denied asylum based solely on the fact that she is her father's daughter.

The bill would also grant DHS unfettered authority to deny entry for persons belonging to a group, based solely on DHS's contention that it is a "group of two or more individuals, whether organized or not" which has a subgroup that DHS deems to be terrorist. The legislation does not limit this authority to senior DHS officials or require that the government provide public notice that it considers such groups to be a terrorist organization.

D. Expanding Grounds for Deportation would also Unfairly Burden Free Speech and Association

Section 104 of H.R. 418 vastly expands the grounds for deportation by making immigrants removable from the U.S. for any acts or associations meeting the inadmissibility grounds described above. Not only would remote links to terrorism, donations to organizations that one did not know had links to terrorism, recruiting members for organizations that are caught by these broad definitions keep a person from getting in to the U.S. – they would also make an immigrant living here deportable.

The definitions are broad enough to deport immigrants for exercising rights of free speech that are protected under the U.S. Constitution.

An immigrant can already be deported for providing any support to a designated terrorist organization, or for providing any support for terrorist activities. H.R. 418 would make donations that were completely legal at the time they were made, into grounds for deportation if the organization receiving the donation was later designated as a terrorist organization. This new deportation provision would apply retroactively, even to legal permanent residents who may have lived here for decades.

For example, a long time Irish American permanent resident could be subject to deportation for providing non-violent humanitarian support to an organization in the 1960s that was labeled a "terrorist organization" by the U.S. government decades later, even if their donation was legal at the time it was made. Similarly, a South African immigrant who supported the African National Congress' lawful, nonviolent anti-apartheid work during the 1980's would be deportable, and it would be no defense to show that the support was legal at the time. (The ANC also used violence, and the State Department regularly labeled it a "terrorist organization" until it came to power in South Africa.) Section 104 would also render deportable immigrants who urged support of the Northern Alliance against the Taliban, or who supported the Contras in Nicaragua, regardless of whether their targets were lawful military targets, and regardless of the fact that the U.S. supported both military struggles.

These provisions impose "guilt by association," rendering people deportable for wholly lawful and peaceful activity if such activity supports any group that has engaged in the use of weapons or has threatened to use weapons. Anyone who has given money to entities such as a hospital or school that has an association in any way with a group that uses guns (or threatens to use

guns) would be deportable. The proposed measures would render deportable individuals who provided support, whether or not the group was a designated terrorist organization.

Elimination of the requirement that the group be a "designated" terrorist organization vitiates an agreement brokered during PATRIOT Act debate. Under the PATRIOT Act, a foreign national who supports a designated terrorist group is automatically deportable. A foreign national who supports a non-designated group that has engaged in "terrorism" (including any use or threat to use a weapon) also is deportable but ONLY if he supported the group's "terrorist activity." Under this proposal, the individual is deportable unless he can prove by clear and convincing evidence that he neither knew nor should have known that the organization is a "terrorist organization."

The legislation would also extend punishment to spouses and children, even if they have no knowledge of the association. Like section 103, it would make immigrants deportable based on the actions of their spouses and parents. Thus, for example, Aung is a 13-year-old child who files an asylum application because he fears persecution in his home country of Burma. Aung was threatened with death because his father had joined an insurgency against Burma's government. Under H.R. 418, Aung can be denied asylum based on his father's association with the insurgency. Aung could also be deported-and denied asylum-even if all his father did was write essays justifying armed struggle against a dictatorial regime.

E. The Restrictions on Judicial Review and Habeas Corpus Unfairly and Unconstitutionally Limits Review of Executive Actions

Under Section 105 of the Manager's amendment, the bill not only forecloses habeas corpus review in those cases where a "petition for review" is barred under section 242(a)(2) of the Immigration and Nationality Act – it goes much further by redefining "judicial review" and "jurisdiction to review" throughout the INA to include review by habeas corpus. This is a radical departure in immigration law because it changes the longstanding, historical meaning of "jurisdiction to review" and "judicial review" – "terms of art" that have been long interpreted in immigration matters as distinct from review by writ of habeas corpus.[12] This section would redefine the meaning of these terms to explicitly forbid access to the "Great Writ" for all claims where "judicial review" or "jurisdiction to review" is barred, dramatically altering at least thirteen separate provisions of the Immigration Act that affect agricultural workers, asylum petitioners, non-immigrants and others. In these cases, habeas review must be available as a safety valve. The Constitution demands court review for all actions that affect the liberty of persons detained by the government.

After barring these claims, the legislation explicitly bars the federal courthouse doors to any alternative appeal through the "Great Writ" of liberty. In so doing, the bill violates the Constitution, which provides that "the Privilege of the Writ of Habeas Corpus shall not be suspended" except in cases of "Rebellion or Invasion."[13] The Supreme Court has held that the

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[12]INS v. St. Cyr, 533 U.S. 289, 312 n.35 (2001).

[13]U.S. CONST. art. I § 9.

Constitution requires any substitute remedy for habeas corpus to be "neither inadequate nor ineffective to test the legality of a person's detention."[14]

This proposal ignores many of the other systemic problems that have led to necessary habeas litigation. The current system makes it very hard for many people to get any review, even if they have a strong claim. Factors negating meaningful review include the lack of access to counsel, detentions in remote areas, lack of notice on how to have a claim heard in court, exceedingly short time limitations to file petitions for review, no protection against deportation during the short time to file for review, and the government's use of hypertechnical arguments to defeat jurisdiction. These factors, plus the 1996 legislation's effective elimination of discretionary relief by the agency, have forced people into habeas litigation.

These provisions would mean eliminating *all* federal court review in many Convention Against Torture cases, prevent the federal courts from reviewing discretionary determinations in immigration cases, and eliminate the power of the federal courts of appeals to issue stays of removal protecting asylum seekers and other immigrants (those, that is, who would remain eligible for federal judicial review after these changes) from deportation while their appeals are pending in federal court. This would allow asylum seekers to be returned to their countries of persecution while their cases were on appeal to the circuit courts. The fact that they were ultimately found eligible for asylum by the federal court would do them little good there.

F. State Drivers License Mandates would Undermine Safety, Burden the States and Lay Foundation for a National ID Card

The driver's license provisions in H.R. 418 overturn a significant portion of the Intelligence Reform Act Of 2004 in order to establish new more onerous driver's license requirements without state involvement. More specifically, these provisions prohibit federal agencies from accepting for any official purpose a state-issued identification card or driver's license that does not meet numerous minimum document requirements and issuance standards, including verification of immigration status. For all non- citizens authorized to be in the United States for a temporary period, the validity period of a driver's license or identification card issued by the State may not exceed the period of authorized stay. For non- citizens with no fixed period of authorized stay, the validity period of driver's licenses and identification cards shall not exceed one year. Even further, states are required, as a precondition to federal financial assistance, to participate in the interstate database for sharing driver's license information known as the Driver License Agreement.

We agree with the findings of the 9/11 Commission that driver's licenses and identification cards should be secure and should not be easily obtainable by terrorists. However, creating a national ID, as this provision does, is not the answer. All of the States and relevant federal agencies should have a role in carefully constructing appropriate national standards that ensure public safety. Conversely, H.R. 418 imposes a rigid, federal mandate that tramples states' and individuals' rights and makes us less secure.

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[14]Swain v. Pressley, 430 U.S. 372, 381 (1977).

First and foremost, title II of H.R. 418 repeals the driver's license standards enacted less than two months ago in the Intelligence Reform and Terrorism Prevention Act of 2004. These standards were the result of extensive investigation and recommendations by the 9/11 Commission and grew from bipartisan and bicameral negotiations. Specifically, the new driver's license standards enacted at the end of the 108th Congress explicitly address recommendations that the "federal government … set standards for the issuance of birth certificates and sources of identification such as driver's licenses." The law requires the federal government to set federal standards for driver's licenses, including standards for documentation required as proof of identity of an applicant; standards for the processing of applications to prevent fraud; standards for information to be included on driver's licenses; and security standards to ensure that licenses are resistant to tampering, alteration, or counterfeiting. These standards are to be set by the Department of Transportation through a "negotiated rulemaking" process that includes relevant stakeholders such as state elected officials and state motor vehicle departments. The current process allows the states to maintain their ability to set eligibility standards, while also recognizing the need to prevent identity theft and fraud.

Overturning these significant reforms within months of their passage in order to substitute politically motivated and rigid immigration status based restrictions is reckless. H.R. 418 will undermine the work of the 108th Congress and will further delay the implementation of meaningful reforms. In fact, the National Governors Association and American Association of Motor Vehicles have asked Congressional leaders to oppose H.R 418 and allow the provisions of the Intelligence Reform Act of 2004 to work, stating, " Governors and motor vehicle administrators are committed to this process because it will allow us to develop mutually agreed upon standards that can truly help create a more secure America".[15]

Even further, proponents of the driver's license provisions purport that the Intelligence Reform Act passed in the 108th Congress left driver's licenses exposed to abuse by terrorists. However, it is important to note that a potential terrorist could get on an airplane today using a wide variety of government-issued identification documents not covered in the bill, including a US or foreign passport. Moreover, a number of the 9/11 terrorists were legally admitted to the U.S. and would have had the necessary documents to obtain a drivers license. Records of such driver's licenses were actually invaluable after 9/11 in tracking where the terrorists had been in the United States and with whom they had associated. This information was also used to prosecute many individuals who would not have been discovered otherwise.

Second, the very fact that 13 million undocumented aliens are already within our borders means that a perimeter-based defense is porous. The proposed policy would eliminate another opportunity to screen this large pool of people and to separate "otherwise law abiding" undocumented aliens from terrorists or criminals by confirming identity when licenses are issued or when such licenses are presented or used for screening at checkpoints. Consequently, this

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[15] Letter to Hon J. Dennis Hastert, Hon. Thomas Delay, and Hon. Nancy Pelosi from Executive Director of National Governors Association Raymond Scheppe and American Association of Motor Vehicle Administrators President and CEO Linda R. Lewis; February 8, 2005.

legislation would guarantee a larger haystack in which terrorists could hide and force law enforcement to expend already scarce resources to sift through the 13 million undocumented aliens in order to identify terrorists.

Third, these provisions would increase the incentives for fraud and create significant new demand for fraudulent licenses. State DMV bureaucracies, no matter how well-intentioned, do not have the resources, training, or skill to prevent fraud driven by this additional demand and no federal mandate will be able to prevent organized criminal elements from responding. Conversely, if illegal aliens are allowed to get legitimate licenses upon thorough vetting of their identity, then the only ones who will be trying to get fraudulent documents will be terrorists or criminals – and law enforcement resources can be focused on these activities.

Fourth, it is important to recognize that driver's licenses are not simply identification documents. Their purpose is to ensure that people are safe drivers, who know the traffic laws and have defensive driving skills, before they drive on our roads and highways. Denying millions of people access to licenses will pose a significant safety risk. Traffic accidents are the leading cause of death, with forty-four thousand traffic fatalities in 2002.[16] Even further, according to a study conducted for the AAA Foundation for Traffic Safety, unlicensed drivers are five times more likely to be in fatal crashes than drivers with valid licenses.[17] Licensing also makes it possible for drivers to have liability insurance to protect other drivers on the road.

It is for these reasons that 14 states recognized their obligation to ensure the public safety and currently allow driver's licenses to be obtained without showing "legal presence." This legislation, however, would preempt such state policies leave citizens vulnerable to millions of immigrant drivers on the roads without licenses. It should be noted that many undocumented aliens who do not are going to drive whether they have driver's licenses or not. Preventing the states from issuing driver's licenses to these aliens will result in millions of untested, uninsured drivers on the roads.

Fifth, the provision would impose a significant and likely unfunded burden on the States. The National Governors Association "strongly oppose[d]" nearly identical provisions when they were included in H.R. 10.[18] They noted that the bill was "drafted without any input from Governors" and "exclude[s] states from the standard-setting process despite states' historic roles as issuers of driver's licenses and other identification data."[19] In their opinion, the bill "would impose unworkable technological standards and verification procedures on states, many of which are well beyond the current capacity of even the federal government." They opposed the requirement that they share their state information with the federal government. In their view,

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[16]NATIONAL SAFETY COUNCIL, INJURY FACTS: REPORT ON INJURIES IN AMERICA (2003).

[17]AAA FOUNDATION FOR TRAFFIC SAFETY, UNLICENSED TO KILL: THE SEQUEL (Jan. 2003).

[18]NGA Letter.

[19]*Id.*

this proposal would "create financial, administrative and implementation problems by requiring state compliance with these unprecedented, federally-imposed standards within a short time frame." In addition, "the cost of implementing such standards for the 220 million driver's licenses issued by states represents a massive unfunded federal mandate."[20]

More recently, the National Conference of State Legislatures, a national bipartisan organization representing the legislatures of all 50 States, the territories and the commonwealths, urged Speaker Hastert and Leader Pelosi to oppose this provision.[21] They noted that "Both Congress and the Administration agreed that State officials experienced with driver's license issuance must be involved in the rulemaking process for effective, feasible reforms to be implemented." The provisions in the legislation, according to NCSL, "instead threaten to handcuff State officials with unworkable, unproven, costly mandates that compel States to enforce federal immigration policy rather than advance the paramount objective of making State-issued identity documents more secure and verifiable." Moreover States would be burdened with navigating federal data systems, application backlogs, and the 100-plus types of issued visas with little federal assistance or accountability.

The states have traditionally determining how features for licenses and ID cards should be changed. Despite their expertise, however, they had no role in developing the requirements in this legislation. In effect, this provision empowers the Federal government to usurp state control over licensing and identification and establishes the equivalent of a national identity card with different state names on them. As the NCSL wrote:

> These provisions show no respect for federalism. They constitute egregious unfunded mandates dealing with drivers' licenses, birth certificates, personal identification cards and use of social security numbers that are likely to impose billions in costs on states. They preempt and undercut state legislative authority through a federally-contrived rulemaking process... They compel state participation in compacts that are not recognized by state lawmakers and elected officials. They reference a federal grant process and funding of 'sums as may be necessary,' all in an environment of bulging federal deficits and constraints on domestic discretionary spending.

Although the legislation empowers the DHS to make grants to the states to assist their efforts to conform to the minimum standards in the legislation, there is no guarantee that these grants will be made to all states and territories, or that sufficient funds will be provided to cover the massive expenses of these reforms. Furthermore, the demand for state compliance is not contingent upon the provision of federal funding to meet the costs of these reforms. The result will likely be a large unfunded mandate upon the states.[22] As many states continue to struggle

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[20] *Id.*

[21] NCSL Letter, dated February 3, 2005.

[22] *See* NGA Letter.

financially as a result of other federal budget cuts in recent years, these provisions will further burden them with the cost of implementing federal standards aimed at controlling immigration.

H.R. 418 lays the groundwork for a national ID card by imposing a computerized national database of every American driver's license and state identification card under the guise of strengthening our homeland security. Past efforts to establish a national ID card to identify and track U.S. residents have failed due to the clear threats they pose to our liberty.[23] H.R. 418 seeks to achieve that same purpose through the back door. Instead of creating a new national ID card, whose data would be held and monitored by the Federal government, this proposal mandates that the states maintain the data in a mega-database whose data must be shared by all 50 states and the U.S. territories. It specifically requires that states must agree to participate in an interstate compact for the electronic sharing of driver license data, known as the "Driver License Agreement," in order to receive any grants or assistance under the bill. These provisions further require state motor vehicle databases contain *at a minimum* (1) all data fields printed on driver's licenses and identification cards issued by the state, and (2) motor vehicle drivers' histories, including motor vehicle violations, suspensions, and points on licenses. The resulting mega-database of every adult in every state will threaten our Constitutional rights and truly usher in the era of a "Big Brother" government.

It is important to note that there are no privacy limitations on the use of this data.[24] The bill does not prevent the sharing of this information with other people, companies, Federal government agencies or foreign governments that may make inquiries. There are no systems for maintaining the data-share system, insuring the accuracy of the data, preventing fraud and tampering, making corrections, or filing complaints for inaccuracy or misuse of the data. Moreover, some states do not even have accurate or complete databases. The lack of data safeguards ensures that the data will often be inaccurate and misused. There will be serious

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[23] *See* ALISON M. SMITH, CONGRESSIONAL RESEARCH SERVICE, NATIONAL IDENTIFICATION CARDS: LEGAL ISSUES, n.1-3 (Jan. 3, 2003). Examples include the Immigration Reform and Control Act of 1976, which stated, "Nothing in this section shall be construed to authorize, directly or indirectly, the issuance or use of national identification cards or the establishment of a national identification card." Pub. L. 94-571. Similarly, Rich Thornburg, Attorney General for President George Bush, ruled out identification cards for the use of guns in 1989, feeling that it was "an infringement on rights of Americans." *See* ALISON M. SMITH, CONGRESSIONAL RESEARCH SERVICE, NATIONAL IDENTIFICATION CARDS: LEGAL ISSUES n.2 (Jan. 3, 2003) (citing Ann Debroy, "Thornburg Rules out Two Gun-Control Options," Wash. Post, June 29, 1989 at A 41). Finally, Representative Dick Armey has been quoted as saying, "[w]e didn't beat back the administration's plan to issue us all 'health security cards' only to have Congress adopt an I.D. card to track down immigrants." *Id.* (citing William H. Minor, *Identity Cards and Databases in Health Care: The Need for Federal Privacy Protections*, 28 COLUMB. J.L. & SOC. PROBS. 253,273 (1995)).

[24] *See* Hamilton and Gorton Statement, p.1 ("We also recognize that with the enhanced flow of information comes a need to establish guidelines and oversight to make sure that the privacy of our citizens and residents is respected and preserved.")

consequences for untold numbers of people who may miss flights, land in jail, fail to get benefits or be denied other opportunities due to database errors.

As noted above, the system proposed in this provision dangerously increases the Federal government's ability to monitor individuals. A broad coalition of civil liberties groups such as the ACLU, privacy advocates such as Privacy Rights Clearinghouse and conservative groups such as American Conservative Union and Gun Owners of America strongly oppose the bill because "there is no limit to what other information may eventually be contained in the database".[25] Consequently, the data-sharing system is bound to be subject to unauthorized disclosures, leaks, and abuses. During World War II, for example, supposedly sacrosanct census data was used to identify Japanese-Americans for internment.[26] This mega-database will be a tempting target for future legislation and policies. The FBI could use this database to identify certain immigrants or members of an ethnic group for "voluntary interviews". [27] Collection agencies and states could erroneously identify people as unpaid debtors or child support evaders. People might be identified through the database because they criticized the President for U.S. involvement in a war or protested an international organization for the ills of globalization. The system is ripe for abuse and misuse that will violate people's rights to privacy, speech and civil rights.[28]

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[25] Letter to Congress from American Arab Anti Discrimination Committee, American Association of American Physicians and Surgeon, American Civil Liberties Union, American Conservative Union, American Policy Center, Center fro Cognitive Liberty and Ethics, Computer Professionals For Social Responsibility, Consumer Action, Cyber Privacy Project, Electronic Frontier Foundation, Electronic Privacy Info Center, Free Congress Foundation, Friends Committee on National Legislation, Gun Owners of America, League of United Latin American Citizens, Privacy Journal, Privacy Rights Clearinghouse, Republican Liberty Caucus, World Privacy Forum; February 8, 2005.

[26] H.R. REP. NO. 104-469, 104th Cong., 2d Sess., pt. 1, at 520 (1996)

[27] For example, in late 2001 and 2002, the FBI conducted a program of "voluntary interviews" of over 5000 Muslim residents in the U. S., seeking information related to the September 11, 2001 attacks and terrorist threats to the United States. Similar interviews of Iraqi residents in the U.S. were conducted prior to the initiation of the war in Iraq in 2003.

[28] *See* Hamilton and Gorton Statement at 2 ("We did propose a general test to be applied to consideration of the renewal of other provisions of the USA PATRIOT Act, and we believe that principle should also be applied to other legislative and regulatory proposals that are designed to strengthen our security but that may impinge on individual rights. The test is a simple but important one: The burden of proof should be on the proponents of the measure to establish that the power or authority being sought would in fact materially enhance national security, and that there will be adequate supervision of the exercise of that power or authority top [sic] ensure protection of civil liberties. If the power is granted, there must be adequate guidelines and oversight to properly confine its use.")

It is imperative that an appropriate balance is found between our rights to individual privacy and the federal government's responsibilities to enhance our national security. We can improve the screening of card applicants, enhance the security of the identification cards, and ensure that drivers meet safety tests without violating individual privacy, creating a database with information on almost every U.S. resident and increasing the number of dangerous, uninsured drivers on American roads and highways. Rushing into a bad policy that establishes a "Big Brother" government database that will soon move beyond our control is not the answer. There is no evidence that the 9/11 Commission ever suggested or contemplated such a sweeping, overbroad policy to achieve the objective of securing domestic identification. Individual privacy and states' rights must and can be protected while we improve our national security. Alternative reforms could successfully achieve such balance.

III. Myths and Realities Concerning Legislation

The debate concerning H.R. 418 has taken place in the absence of any hearings or markup, and as a result, has led to a considerable degree of confusion. The following is an effort to respond to many of the misperceptions concerning the legislation.

General

1) ***Myth***: Congress has not taken tough actions to make it more difficult for terrorists to enter our Nation and cause harm.

Reality: In addition to the various restrictions enacted as part of the USA PATRIOT ACT, INS Restructuring bill, and the Homeland Security Bill, the recently enacted Intelligence Reform bill included numerous provisions concerning these issues, including:

- Driver's Licenses, Personal Identification Cards and Birth Certificates (Sec. 7211, 7212) – The Conference Report includes new language based on the Senate bill for developing standards to ensure the integrity of birth certificates, state-issued driver's licenses and identification cards. The provision establishes new requirements to ensure that the applicant is whom they claim to be and to ensure the physical security of the documents. States would receive grants to assist them in implementing the requirements. These provisions do not bar undocumented immigrants from obtaining licenses and IDs, nor does it mandate specific standards, as the House language did, instead these issues are left to the states. The Conference Report includes the states in the standards development processes, and eliminate the national databases to share identity information.

- Identification for Commercial Aircraft and Other Federal Buildings (Sec. 7220) – Allows DHS to establish minimum standards for identification required to board domestic commercial airline flights and to make recommendations for minimum standards to enter other secure federal buildings. Each of these is subject to review and approval by Congress on a fast track basis.

- Travel Documents (Sec. 7209) – Instructs DHS and the State Department to develop a plan to require the use of passports by all U.S. citizens and others for whom documentation was previously waived when entering the U.S. (This eliminates the Western Hemisphere exemption which allows Americans to travel to and from the U.S. to neighboring countries without a passport.) The agencies must also plan for an expedited registered traveler program.

- Visa Revocation (Sec. 5304) – Provides that if a visa is revoked by the State Department, a person will be inadmissible or deportable without judicial or administrative review. If a person is already present in the U.S., however, their deportation will be subject to judicial and administrative review.

- Increases in Detention Beds, and Immigration and Customs Investigators (Sec. 5202, 5203, and 5204) – The Conference Report provides for an increase of not less than 8,000 detention beds each year from FY2006 through FY2010; requires an increase of not less than 800 immigration and customs enforcement investigators for each year from FY2006 through FY2010; and requires an increase of not less than 2,000 border patrol agents for each year from FY2006 through FY2010 (not less than 20% of the net increase will go to the northern border); The House bill would have expanded the categories of aliens who can be excluded from the United States on the basis of involvement in terrorism and made the expanded categories a basis for deportation too.

- Treatment of Aliens Who Commit Acts of Torture, Extrajudicial Killings or Other Atrocities Abroad/ Aliens who have Received Military Type Training (Sec. 5501, 5502, 5402)– The Conference Report establishes exclusion and deportation grounds for aliens who have committed acts of torture or extrajudicial killings abroad, and for foreign government officials who have committed particularly severe violations of religious freedom. The Conference Report also establish a deportation ground for aliens who have received military-type training from terrorist organizations.

- Alien Smuggling (Sec. 5401) – The Conference Report provide authority for enhanced criminal penalties for cases in which someone has been convicted of an alien smuggling offense that was part of an ongoing commercial operation in which aliens were transported in groups of 10 or more, and the aliens were transported in a manner than endangered their lives or the aliens presented a life-threatening health risk to the people in the United States.

Asylum

2) ***Myth***: Members of terrorist organizations are not only explicitly allowed to receive asylum, but asylum regulations and the courts have made it practically impossible for the government to ferret out terrorists who apply for asylum. First, government attorneys are

barred from asking foreign governments about any evidence they might possess about the terrorist activities of asylum claimants. Second, it is extremely difficult for the government to use whatever classified information it may possess related to an asylum applicant without having to release that information to the applicant and put intelligence sources at risk.

Reality: Anyone who has engaged in terrorist activity, has incited or solicited others to commit terrorist activity, has provided material support to anyone who has committed or plans to commit terrorist activity, has solicited anyone for membership in a terrorist organization, or has solicited funds for terrorist activity or a terrorist organization, is barred from asylum under current law. While membership in a "terrorist organization" does not bar a person from refugee protection *per se*, anyone who bears personal responsibility for terrorist acts is already barred from asylum under other existing provisions of the law. In addition, anyone there are reasonable grounds for regarding as a danger to the security of the United States is also barred from asylum. There are certainly some terrorist organizations virtually all of whose members would be properly barred from asylum and withholding of removal under any number of the existing bases for ineligibility described above. But the extraordinary breadth of the current definition of "terrorism" under the Immigration and Nationality Act means that the range of "terrorist organizations" is not limited to organizations like al-Qa'ida that are wholly dedicated to what most of us mean when we use the word "terrorism." It can also include any rebel group, any political movement that has an armed wing, any group, however loosely organized, that includes a "subgroup" that engages in any armed action, groups that have never been designated as terrorist organizations by the U.S. government or understood as such by the general public. A survivor of ethnic cleansing in Darfur who joined a rebel army after his village was wiped out by the Janjaweed, and has a well-founded fear of persecution in Sudan, for example, should have his eligibility for asylum assessed based on his own actions, and should not be subject to categorical exclusion based on the fact that he was a member of a group that engaged in armed conflict.

3) ***Myth***: Often the only evidence available to the government to support an asylum application is the lack of credibility of the applicant. However, the 9th Circuit has been overturning clearly established precedent and is preventing immigration judges from making adverse credibility determinations by limiting to the point of extinction the factors that an immigration judge can consider in finding an alien incredible, and simply not telling the truth

Reality: No one is denying that immigration judges need to evaluate the credibility of asylum applicants. The issue is the basis for those credibility assessments, the process by which they are made, and the availability of review of credibility assessments that lack a valid basis. The Board of Immigration Appeals has held that an immigration judge may not reject an applicant on credibility grounds without "specific and cogent reasons," such as material inconsistencies, vagueness or material omissions in testimony or evidence. This is also the view of federal courts throughout the country. "Although an immigration judge's credibility findings are granted substantial deference by reviewing courts, a trier of fact who rejects a witness's positive testimony because in his or her judgment it lacks

credibility should offer a specific, cogent reason for his or her disbelief." *Figuera* v. *INS*, 886 F.2d 76 (4th Cir. 1986). Reliance on objective rather than subjective factors to assess credibility both increases confidence in the system and reduces the likelihood that credibility assessments will be based on inaccurate assumptions or personal biases.

4) ***Myth***: The bill simply provides a list of long-accepted common-sense factors that an immigration judge can consider in assessing credibility, such as the demeanor, candor, responsiveness and consistency of an asylum applicant or other witness.

Reality: Again, the issue is not whether immigration judges should be allowed to assess the credibility of asylum applicants, certainly it is necessary that they assess the credibility of asylum applicants. Credibility assessments are a universal part of legal fact-finding and do not need to be mandated by statute. The problem is making sure that their decisions about an applicant's credibility are based on reliable and articulable criteria. Immigration judges may take an applicant's demeanor into account, for example, but both the Immigration & Naturalization Service (now U.S. Citizenship and Immigration Services) and the Board of Immigration Appeals, not just the 9th Circuit, have made efforts to reduce reliance on demeanor in credibility assessments. The reason for this is that demeanor has been generally identified, by a broad range of refugee experts and government authorities in the United States and abroad, as an extremely unreliable indicator of credibility. As the Federal Court of Australia has correctly pointed out, "The dangers of attempting to assess the truthfulness of witnesses by reference to their body language, where different cultural backgrounds are involved, are well-known. . . . The problem is exacerbated even more when evidence is given by way of an interpreter. Judging the demeanor of the witness from the tone of the interpreter's answers is obviously impossible."

5) ***Myth***: The bill simply applies the truth that if criminal juries can sentence a criminal defendant to life imprisonment or execution based on adverse credibility determinations, and can do so regardless of the cultural traditions or history of trauma of the witnesses before them, certainly an immigration judge can deny an alien asylum on this basis.

Reality: An applicant's credibility is usually central his or her eligibility for asylum, and a lack of credibility is a perfectly legitimate basis for denying a claim that rests of the truth of the facts asserted. We all agree about this. But these decisions should be based on articulated grounds and subject to scrutiny. That is what the 9th Circuit, every other federal circuit and the Board of Immigration Appeals require. As the UNHCR has noted, "Without question, there are unavoidable subjective elements which come into play in deciding on an application for refugee status. However, the actual determination cannot be arbitrarily made on the basis of the interviewer's intuitive or gut feeling for the case." This is particularly important because the stakes in asylum adjudications are high as high in many cases as in criminal contexts, but without most of the accompanying procedural protections. In immigration court, there is no guarantee of legal representation, the proceedings, other than testimony and the immigration judge's decision, are generally not translated for the applicant. Unlike the criminal context, where the burden is on the state to prove its case beyond a reasonable doubt, in the asylum adjudication context the

asylum applicant bears the burden of establishing her eligibility for asylum based on legal criteria of which she may never be informed. And although immigration judges decide many asylum cases every year, no decision-making system benefits from a lack of oversight. While the majority of immigration judges are conscientious adjudicators who do their best to make fair decisions in a terribly under-resourced system, there are a number of unfortunate exceptions whom the administrative system has shown little interest in dealing with. The 9th Circuit, which has been much criticized by the proponents of this bill, does not deny that immigration judges may consider an applicant's demeanor. But the 9th Circuit has had to deal with one immigration judge, for example, who apparently recycled verbatim a very detailed description of one female applicant's demeanor into her decision denying asylum to an unrelated male applicant based on *his* demeanor. Another immigration judge in Boston was the subject of repeated complaints for abusive behavior and baseless credibility assessments for over 20 years before he was finally suspended from deciding cases after making a racist remark to an African asylum applicant in the presence of an outside medical witness. In addition to these egregious examples, however, honorable adjudicators can also make individual decisions that are based on inaccurate assumptions or flawed perceptions. These decisions should be subject to review. As the 1st Circuit has stated, "Although our review [of credibility determinations] is deferential. . . we have rejected the notion that the INS is an unique kind of administrative agency entitled to extreme deference."

6) ***Myth***: Changes in asylum law are needed because numerous terrorists have applied for asylum, and would likely have received it had they not been first captured after committing or plotting terrorist attacks. For instance, in 1993, Mir Aimal Kansi murdered two CIA employees at CIA headquarters and Ramzi Yousef masterminded the first World Trade Center attack while free after applying for asylum. In the same year, Sheik Omar Abdel Rahman plotted to bomb New York City landmarks after he applied for asylum. Last year, a Pakistani national was plotting to blow up the Herald Square subway station and had more ambitious plans to blow up the Verrazano-Narrows Bridge. He is quoted as saying that "I want at least 1,000 to 2,000 to die in one day." He was an illegal alien, and he had applied for, yes, asylum. He was arrested on August 27th by New York City police officers who had infiltrated his gang.

Reality: These examples do not show a deficiency in the legal bases for eligibility for asylum, as the proponents of this bill acknowledge, none of these people were granted asylum--but rather a failure in intelligence. Failures in intelligence are a real problem, and were a main focus of the 9/11 Commission's report. Those failures should be addressed as the Commission recommended, and not by the cheaper expedient of targeting refugees. We cannot bar people from *applying* for asylum; in fact, applying for asylum currently subjects non-citizens to greater scrutiny than any other form of immigration status they might seek. If, once they have brought themselves to the government's attention by applying for asylum, we realize that they are terrorists or otherwise pose a threat to our security, the Immigration and Nationality Act already gives us the power to detain them. None of this has anything to do with the legal standards for eligibility for asylum.

7) ***Myth***: There are numerous instances of abuse of the asylum system. According to testimony at a Judiciary Committee hearing last Congress, Nasser Ahmed Kadri, a/k/a Ahmed Aly El-Homosany, received asylum despite the presence of some damning evidence that he was a terrorist. For example, the INS provided classified evidence that Homosany was a known member of Al-Gama Al-Islamiya, an organization designated by the Secretary of State as a terrorist organization dedicated to overthrowing the government of Egypt and establishing an Islamic state. The organization was involved in the assassination of Anwar Sadat and the attempted assassination of Hosni Mubarak. Its members carried out the 1997 massacre of 58 foreign tourists in Luxor and are accused by the Egyptian government of killing over 1,000 people. A moderate imam accused Homosany of frequently asserting his affiliation with Al-Gama Al-Islamiya and threatening to send him home to Egypt in a box. And a New York City detective stated in an affidavit that Homosany participated in a meeting with infamous Sheikh Omar Abdel Rahman dedicated to planning acts of terrorism and even discussing the pros and cons of hijacking an airplane.

Reality: Based on publicly available information about the case of Nasser Ahmed, it is clear that the Immigration Judge in this case reviewed all the evidence the INS put forward, including the classified evidence, and decided it was insufficient. The INS appealed to the Board of Immigration Appeals, and the Board of Immigration Appeals upheld the decision of the Immigration Judge. The INS later withdrew its request that the Attorney General reverse the BIA's decision.

8) ***Myth***: Aliens who are believed to be terrorists by their governments can receive asylum on this basis. This is because the 9th Circuit created a precedent that has made it easier for suspected terrorists to receive asylum. The Circuit has held that if a foreign government harasses an alien because it believes the alien to be affiliated with a terrorist group, the alien is eligible for asylum because he is being persecuted on account of the political opinion of that terrorist group.

Reality: People are not eligible for asylum because their governments believe they are terrorists. They are eligible for asylum if they have a well-founded fear of persecution, if they are not subject to any bars to asylum, and if they are eligible for asylum in the exercise of an adjudicator's discretion. Of course governments may legitimately enforce their criminal and anti-terrorism laws. But that is not what was going on in the 9th Circuit cases alluded to above. Those cases involved, for example, an applicant who had been repeatedly kicked and beaten with batons, gun butts, and plastic pipes filled with sand, tipped upside down with his head immersed in a drum of water, while being interrogated, threatened, and and pressured to become an informer against any guerrilla members in his own family, and was detained without ever being charged with any offense. What the 9th Circuit has held, in contexts of documented widespread arbitrary arrests and detentions, is that when a government engages in extra-judicial punishment of a person and there is no evidence of a legitimate prosecutorial purpose for the government's actions, there arises a presumption that the government's motive is political. (In many of these cases, ethnicity and/or religion are also major factors.) But the notion that prosecution or criminal or terrorist investigations may be pre-textual, or

may become persecution where it is arbitrary or excessive, is also a well-established precedent of the Board of Immigration Appeals and of other federal circuits, and is also the view of the UNHCR. To quote the 3d Circuit in *Senathirajah* v. *INS*, "we emphasize that torture does not constitute valid governmental investigation, and conduct such as beating with bats, and forcing one to drink one's own urine when thirsty ought not to be mistaken for legitimate governmental investigations by any judge."

9) ***Myth***: While our government can respond by establishing that the applicant has committed a terrorist act and that the foreign government was not mistaken in its belief that the applicant was a terrorist, government attorneys are barred from verifying with the alien's home government claims on the asylum application and possible links to terrorist activity.

Reality: The proponents of this bill are saying that it is too difficult for the U.S. government, with all its investigative powers, to make any showing that a person applying for asylum in this country has committed terrorist activity, so we should instead place the burden on a refugee applicant to prove that he has *not*? This is not the way our legal system works. Contrary to the assertions above, government attorneys may do many things to investigate an applicant for asylum, in addition to the multiple security checks that are routine and required before any case is granted. A government investigator may request information from an applicant's government or from third parties concerning an applicant for asylum or information contained in the application, so long as the investigator does this in a way that does not allow the applicant's government or third parties to link the applicant's identity to the fact that the applicant has applied for asylum in the U.S., to specific facts contained in the asylum claim, or to facts that would give rise to a reasonable inference that the applicant has applied for asylum. In other words, the government may investigate as long as it does so carefully, so as not to jeopardize the safety of the applicant or of her relatives and associates back home.

10) ***Myth***: While we have no specific numbers on how often suspected terrorists receive asylum, the Department of Justice's Office of the Inspector General reports that INS trial attorneys said that it was common for asylum applicants to make claims that they were falsely accused of being terrorists.

Reality: Repressive regimes around the world attempt to discredit legitimate critics and political opposition members, and persecute ethnic minorities, by accusing them of being rebels or of supporting guerrilla or terrorist groups. Former President Charles Taylor of Liberia, himself a notorious rebel warlord currently evading extradition in Nigeria, accused many of his critics, from lawyers to journalists to human rights activists--of being "unlawful combatants," rebel supporters, and terrorists. The Russian government is currently threatening to prosecute a leader of an internationally respected human rights organization under loosely-worded anti-terrorism and anti-extremism laws for publishing two articles calling for *peace* in Chechnya. We insult victims of such abusive government practices when we assume that any refugee claim they might make should be viewed with suspicion. In addition to such cynical abuses of anti-terrorist rhetoric, repressive governments faced with armed insurgencies often resort to ethnic or religious

persecution as a counter-insurgency tactic. Saddam Hussein, for example, when faced with an actual uprising by Shias in the South of Iraq, responded by rounding up large numbers of Shiite men and executing them extrajudicially. Sri Lankan and Indian forces in Sri Lanka, during the worst periods of their war against the LTTE, tortured or killed thousands of non-combatant Tamil civilians. A young man who testifies that he was arrested and accused of being a terrorist by government forces because he was young, male, and a member of the wrong ethnic group in the wrong place at the wrong time, is describing the way armies and police forces behave in many parts of the world. Those who torture this young man may genuinely believe that he is or may be a terrorist, or they may not care, they may have reached the point of seeing all members of his ethnic group as enemies, and think that abusing him will help instill terror among his ethnic group as a whole and deter them from supporting the rebels. Victims of such practices are and should remain eligible for refugee protection under U.S. and international law.

11) ***Myth***: Requiring asylum applicants to prove that a central reason for their persecution was one of the five listed factors as the bill does merely restates the common understanding of asylum law before the 9th Circuit case.

Reality: The "centrality" requirement does not reflect the common understanding of asylum law. Before the U.S. even passed the Refugee Act of 1980, the UNHCR, interpreting the international refugee definition which we incorporated into our own law, was cautioning that in many cases "the applicant himself may not be aware of the reasons for the persecution feared. It is not, however, his duty to analyze his case to such an extent as to identify the reasons in detail." UNHCR Handbook on Procedure and Criteria for Determining Refugee Status, ¶66. And the BIA has long held that an applicant does not bear the unreasonable burden of establishing a persecutor's exact motivation where different reasons for the persecution are possible.

12) ***Myth***: The bill simply provides that while the testimony of an asylum applicant may be sufficient in itself to justify asylum, where the immigration judge determines that the applicant should provide corroborating evidence, such evidence must be provided unless the applicant does not have the evidence or cannot obtain it without departing the U.S. This provision merely restates generally accepted precedent outside of the 9th Circuit. For example, the Board of Immigration Appeals has recognized that an asylum applicant bears the burden of explaining any lack of supporting evidence, where corroborating evidence can be reasonably expected and such evidence is central to the alien's claim.

Reality: Yes, that is what the BIA has held, but that is not what this bill provides. The bill states that if corroborating evidence is required, the applicant must provide it unless the applicant does not have the evidence or cannot obtain it without departing the United States. The bill makes no provision for considering and evaluating an applicant's explanation of any of the many other valid reasons why he or she may not be able to obtain a particular item of evidence– including lack of resources, lack of cooperation by third parties, the illiteracy of potential witnesses abroad, or fears for the safety of friends and family members in the home country if they tried to obtain corroborating documentation on the applicant's behalf.

13) ***Myth***: In its Handbook on Procedures and Criteria for Determining Refugee Status, the United Nations High Commissioner for Refugees explains that the asylum applicant should "[m]ake an effort to support his statements by any available evidence and give a satisfactory explanation for any lack of evidence. If necessary he must make an effort to procure additional evidence."

Such corroborating evidence includes:

- basic documentation of nationality and identity;
- confirmation of claimed presence at a refugee camp;
- evidence from family members who purportedly are aware of the facts underlying an asylum claim;
- where an alien has claimed that he had received a threatening letter based upon a single photograph in a nationwide newspaper of a demonstration that he participated in with 150 other college students a year earlier, either the letter, the article, or an affidavit from his father who purportedly saw the letter; and
- where alien has claimed persecution on account of tribal membership, evidence that the tribe exists.

It is unfair to suggest, as have some, that the bill is requiring that the asylum applicant have to provide a letter certifying his persecution by his persecutor.

Reality: We are glad to hear that the proponents of this bill do not intend to require asylum applicants to provide affidavits from their persecutors, but we have seen cases even under current law where adjudicators have demanded forms of corroboration nearly as ludicrous as this. And under this bill, these heightened corroboration requirements could be invoked as a matter of the immigration judge's *discretion*. Issues of corroboration typically go to the eligibility phase of an asylum adjudication–that is, the determination whether or not the applicant has established that he or she meets the refugee definition–which is not a discretionary determination, and applies also to eligibility for withholding of removal, which is not a discretionary form of protection. These are determinations of fact and law and should be reviewed accordingly.

14) ***Myth***: The bill would not prevent rape victims from Dafur from being able to receive asylum. Nothing in this bill will prevent a legitimate victim of persecution from receiving asylum.

Reality: Unfortunately, this bill will in fact make it harder for legitimate victims of persecution, particularly those who have suffered traumatic forms of harm and/or are coming out of chaotic refugee situations, to gain protection in the U.S. Where people have sought asylum in the U.S. after passing through a refugee camp in a third country–as would be the case of rape victims from Darfur who, if they are lucky enough no longer to be in Darfur, are for the most part scattered in refugee camps in Eastern Chad – immigration judges have regularly required them to provide "confirmation of their claimed presence at a refugee camp," a form of corroborating evidence the proponents of this bill cite as an example of the reasonableness of their planned requirements.

Unfortunately, this misunderstands the reality of most refugee camps. It is a fact, which the UNHCR has confirmed in a great many asylum cases, that in many such refugee crises the UNHCR is simply unable to provide records of a person's stay in the camp, and that this does not mean the person was not there, even for an extended period. When the Mauritanian government, 15 years ago, conducted a campaign of terror and expulsion against its own black African ethnic groups, it accused them of being Senegalese and expelled them. Senegal in large numbers, often after stripping them of their identity documents. After difficult stays in refugee camps in Senegal, many of these refugees sought asylum in the U.S., only to face demands from American adjudicators that they provide documentary proof of their Mauritanian citizenship and of their stays in refugee camps in Senegal, documentation that had been destroyed or that the authorities running those camps were simply incapable of providing.

Inadmissibility and Deportability of Terrorists

15) ***Myth***: One of the most basic defects in the manner in which our immigration laws respond to the threat from alien terrorists is that not all terrorism-related grounds of inadmissibility are also grounds of deportability. Essentially, some terrorists and their supporters can be kept out of the United States, but as soon as they set foot in the U.S. on tourist visas, we cannot deport them for the very same offenses. This hinders our ability to protect Americans from those alien terrorists who have infiltrated the United States.

Reality: Being the child or the spouse of someone held to be inadmissible on terrorist-related grounds is not an "offense." Yet H.R. 418 would make children and spouses of those subject to its expanded terrorism-related provisions not only inadmissible but deportable as well. It should be noted also that anyone who was inadmissible on terrorist grounds at the time of he or she was admitted to the United States or adjusted his or her status to that of permanent resident is deportable on that basis under existing section 237(a)(1). Deportation on terrorist-related grounds that arise after admission is properly limited under current law to persons who engage in terrorist activity (which includes those who incite terrorist activity). It may not be based on guilt by association, or on speech that is protected by the First Amendment.

In addition to turning all grounds of inadmissibility into a basis for deportation, H.R. 418 also makes all grounds of inadmissibility/deportability related to terrorism bars to refugee protection as well. It would thus allow a person who has established that she would face persecution in the event she were deported to be excluded from the protections of asylum and withholding of removal based on the actions of others or based on associations or speech of her own that are non-violent and protected under the U.S. constitution. This violates U.S. obligations under international refugee law, which requires that exclusion from refugee protection be based on individual responsibility for prohibited acts.

16) ***Myth***: The bill also modifies the terrorism-related grounds of inadmissibility because the current Immigration and Nationality Act is based on a flawed understanding of how terrorist organizations operate. The Act now reads that if an alien provides funding or other material support to a terrorist organization that has not yet been designated by the

Secretary of State as a terrorist organization, the alien is not inadmissible or deportable if the alien can show that he did not know that the funds or support would further the organization's terrorist activity, i.e., his donation did not immediately go to buying explosives. Unfortunately, many terrorist organizations use front organizations to support their terrorist activities and as cover for their terrorist activities. Based on this understanding of how terrorist organizations work, the bill is written so that an alien who provides funds or other material support to any terrorist organization would be deportable unless he did not know, and should not reasonably have known, that the organization was a terrorist organization.

Reality: The problem is that the definition of an undesignated "terrorist organization" under existing law is extremely broad and vague, and the REAL ID Act would make it even more so. The REAL ID Act would describe any "group of two or more individuals, whether organized or not, which engages in, or has a subgroup which engages in" a range of activities so broad it would cover any use or threatened use of a weapon or "dangerous device" for any purpose other than personal monetary gain. Thus any group could be considered a "terrorist organization" if any subset of its membership provided "material support" to any individual who had ever committed a "terrorist activity." This would make it impossible for people contemplating a contribution to a charity, for example, to be confident that the Department of Homeland Security would not consider the group to be a "terrorist organization." Similarly, a person should be able to join a mosque, a church, a synagogue, or a temple, without having to worry that they could become deportable because *other* members of the congregation may have given money to a charity that is deemed to be a "terrorist organization" under this definition–even if they themselves have not. In the United States, non-citizens and citizens alike have the right to enjoy freedom of worship and freedom of association with freedom from fear. The REAL ID Act diminishes these values.

17) ***Myth***: It is unfair to argue as bill opponents do that calling for the deportation of aliens who are coerced into contributing money to terrorist organizations, such as the Revolutionary Armed Forces of Columbia, is unfair. The Revolutionary Armed Forces of Columbia, the FARC, have been designated as a terrorist organization since 1997. Thus, current law already provides that any alien who contributes funds to the FARC is deportable, even if coerced. If one would like to propose a modification to current law that would exempt contributions made to terrorist organizations under the threat of death or other severe penalty, this could be considered. However, we have to ensure that we do not allow every alien who contributes to a terrorist organization to be able to make a baseless claim of coercion. And the Department of Homeland Security of course can utilize prosecutorial discretion and decline to bring a deportation action against any alien who had to make a coerced contribution.

Reality: Actually, H.R. 418 would *eliminate* a provision of current law that provides for such prosecutorial discretion. Current law provides an exception allowing the Secretary of State and the Secretary of Homeland Security, in consultation with each other, discretion not to apply the "material support" provision in a particular case if the Secretary of State/Attorney General decide this provision should not apply.

Notwithstanding this exception, the Department of Homeland Security and the Attorney General are invoking the "material support" provision not only as grounds for inadmissibility and deportation but as a bar to refugee protection for victims of extortion by terrorist groups. In other words, there is currently an exception allowing DHS to exercise prosecutorial discretion, and they are not using it to resolve this problem. But in any case, the legislation would *eliminate* this exception!

18) ***Myth***: It does not violate the constitutional rights of aliens to deport them for espousing terrorism because it is a privilege for any alien to be allowed to live in the United States. France and England have and use the power to deport radical imams espousing terrorism– so should we.

Reality: First, as noted earlier, the definition of "terrorist activity" under the Immigration and Nationality Act goes well beyond what many understand as terrorism. On its face, the INA can cover anything from rebellion against a dictatorial regime to the threatened use of force in a personal dispute. This trivialization of the term "terrorism" is already a major problem with the existing statute, and the root of many of the problems posed by the legislation's proposed expansions.

Second, yes, this bill does violate the constitutional rights of non-citizens in the United States by making them liable to deportation for exercising their right of free speech. The First Amendment guarantees this right to them as it does to citizens, subject to the same limitations.

The problem with H.R. 418 is that its expansions would be layered on top of a definition of "terrorism" so overbroad that these further expansions would both chill pure speech and association and bar genuine refugees from asylum for exercising those same rights. The intersection of freedom of speech with other important interests raises significant issues, and there is a long and rich history of American jurisprudence addressing those. We also have a constitutional tradition of equal protection and due process, which holds that the answers to these important questions must be the same for U.S. citizens and for non-citizens in the United States.

19) ***Myth***: The Immigration and Nationality Act of 1952 made the advocacy of communism a deportable offense. Until this section's repeal in 1990, it was never found to be unconstitutional.

Reality: The McCarthy-era provisions of the Immigration and National Act of 1952 (also known as the McCarran-Walter Act) making non-citizens deportable for their political associations and advocacy were in fact struck down by a federal court in 1989; although the decision was reversed in part on appeal (not on the merits but on the grounds that the constitutional question was not ripe for judicial review), the McCarran-Walter Act was repealed in 1990 for good reason. We agree that the similar provisions of the REAL ID Act would blast the statutory rights of speech and association of non-citizens in the United States back to the age of McCarthy. We disagree with the view that this would be a good thing.